Editor's note: appealed -- reversed, sub nom. NL Industries, Inc. v. Watt, Civ.No. 82-176-RDF (D.Nev. Mar. 13, 1984), rev'd after third party appeal, No. 84-2344 (9th Cir. July 25, 1985), amended, D.Ct. ordered to affirm IBLA, 777 F.2d 433 (1985); decision vacated, case remanded on remand from District Court by order dated Feb. 19, 1985 -- See 60 IBLA 98A & B below.

N. L. BAROID PETROLEUM SERVICES

IBLA 81-251 Decided November 19, 1981

Appeal from decision of the Nevada State Office, Bureau of Land Management, declaring mining claims N MC 11431 through N MC 11441 abandoned and void.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

   The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

2. Federal Land Policy and Management Act of 1976: Assessment Work -- Mining Claims: Assessment Work

   Where the owner of an unpatented mining claim located prior to Oct. 21, 1976, files proof of annual assessment work or a notice of intention to hold the claim in calendar year 1977, the owner is required by the terms of the statute to file proof of assessment work within each calendar year (on or before Dec. 30) thereafter.

3. Federal Land Policy and Management Act of 1976: Assessment Work -- Mining Claims: Assessment Work

Where the owner of an unpatented mining claim located prior to Oct. 21, 1976, and recorded with BLM in 1977, fails to file an affidavit of assessment work or notice of intention to hold the claim on or before Dec. 30 of the calendar year following the calendar year in which he recorded in the BLM office, i.e., on or after Jan. 1, and on or before Dec. 30, 1978, the claim is properly deemed conclusively abandoned and void.

APPEARANCES: Earl M. Hill, Esq., and Robert E. McCarthy, Esq., Reno, Nevada, for appellant; Hugh C. Garner, Esq., Salt Lake City, Utah, for intervenor, All Minerals Corporation.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

N. L. Baroid Petroleum Services (NL) has appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated December 9, 1980, declaring 11 mining claims N MC 11431 through N MC 11441 (listed in Appendix A) abandoned and void for failure to file the instruments required by 43 CFR 3833.2 within the time limits prescribed therein. These requirements were imposed pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976).

The claims were originally located in September of 1967 and recorded with BLM on December 7, 1977. 1/ Appellant initially filed evidence of assessment work on December 14, 1977. However, when appellant failed thereafter to file evidence of assessment work or a notice of intention to hold the claims, on or before December 30, 1978, BLM issued its decision declaring the claims abandoned and void. 2/

1/ The record shows amendments for the claims filed with BLM Mar. 15, 1979, and Apr. 1, 1980. Appellant has also submitted on appeal copies of notices and certificates of amended location and additional location for the claims recorded with Nye County, Jan. 13, 1981.

2/ Appellant has submitted affidavits of annual assessment for subsequent assessment years 1978-79, 1979-80, and 1980-81, which have been filed with Nye County, Aug. 27, 1979, Nov. 29, 1979, and June 23, 1981, and copies of notices of intention to hold the same claims recorded in Nye County, Nov. 29, 1979, and Apr. 27, 1981.

After NL filed a timely appeal and statement of reasons, All Minerals Corporation (AMC) requested permission to intervene in this appeal based on its conflicting claims of an interest in a portion of the lands embraced within NL's mining claims, and the fact that appellant and AMC are involved in a civil action in state court concerning ownership of the claimed lands. 3/ By order of March 5, 1971, the Board granted AMC leave to intervene in this appeal as a party. Subsequently, AMC filed a timely response to appellant's statement of reasons. 4/

[1] Section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1976), requires the owner of an unpatented mining claim located prior to October 21, 1976, to file evidence of annual assessment work for the claim with BLM within the 3-year period following that date and prior to December 31 of each year thereafter. The corresponding Departmental regulation, 43 CFR 3833.2-1(a), reads:

> The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim. [Emphasis added.]

Failure to so file is considered conclusively to constitute abandonment of the claim under section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1976), and 43 CFR 3833.4(a).

In its statement of reasons appellant contends that it did in fact timely file affidavits of annual work for the 1977-78 assessment year with BLM. On appeal appellant submitted a copy of the 1978 affidavit of assessment which was recorded in the Nye County records on September 18, 1978. Appellant asserts that in the normal course of its business practices, such affidavits are filed with the proper BLM office after the county recording. However, appellant admits that none of these filed affidavits, or proof of their filing with BLM, can be found.

3/ The parties are currently involved in a civil action, NL Industries, Inc. v. All Minerals Corporation, Case No. 8859, in the District Court of the Fifth Judicial District of the State of Nevada, Nye County. AMC is similarly involved in an appeal before this Board, IBLA 80-475, involving the KD Nos. 1 through 34 mining claims, N MC 51047 through N MC 51080, in which appellant is an adverse party.

4/ NL submitted a reply and supplemental statement of reasons, to which AMC filed responsive pleadings.

Accordingly, without probative evidence to show the documents were ever filed with BLM, we must presume they were never received by BLM. Harwell Mining Co., 56 IBLA 236 (1981); cf. Bruce L. Baker, 55 IBLA 55 (1981).

Appellant argues, inter alia, that the regulation 43 CFR 3833.2-1(a) implementing section 314(a) of FLPMA as to claims located prior to October 21, 1976, has imposed more stringent requirements for compliance than are mandated by the Act and operates to broaden the grounds upon which the claims are being invalidated. Appellant asserts that it has complied with the statute by its filing of December 14, 1977, which constituted evidence of annual assessment work for the preceding assessment year required to be filed before December 30, 1978.

This Board has recognized the difference in the language of the statute from that of the regulation. While 43 U.S.C. § 1744(a) (1976) merely requires the timely filing of an affidavit of assessment, the Departmental regulation 43 CFR 3833.2-1 specifically requires the timely filing of an affidavit of assessment for the preceding assessment year. Perry L. Johnson, 57 IBLA 20 (1981); Harry J. Pike, 57 IBLA 15 (1981).

This Board has also noted in prior decisions the different consequences which flow from a failure to comply with the statutory provisions vis-a-vis a failure to comply with regulatory requirements. See Robert W. Hansen, 46 IBLA 93 (1980); Feldslite Corporation of America, 56 IBLA 78, 88 I.D. (1981). Where there is a failure to comply with a requirement imposed only by regulation (as opposed to statute), the deficiency is subject to curative action. Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981); Mrs. Otis Teaford, 56 IBLA 367 (1981). However, unlike these cases, the situation currently before us is not a failure of appellant to meet one of these regulatory requirements. Appellant has made no annual filing for the calendar year 1978, as opposed to a mere defective filing recognized as a curable defect pursuant to the court's rationale in Topaz Beryllium, supra. Therefore, curative action is not an available remedy in this instance.

[2] In our recent decision in Harvey A. Clifton, 60 IBLA 29 (1981), we examined the relationship between the language of 43 U.S.C. § 1744(a) (1976) and 43 CFR 3833.2-1(a). In that decision we noted that, while the statute only required the subsequent annual filing of assessment work, or a notice of intention to hold, after the initial filing of the assessment work or notice of intention to hold (provided the initial filing was no later than October 22, 1979), the regulation required annual filings commencing in the calendar year following recordation of the claim. Thus, in many cases, the regulation would require a filing of assessment work or a notice of intention to hold

prior to the time for filing mandated by the statute. We therefore held in Harvey A. Clifton, supra, as we have held in a number of cases (see, e.g., Perry L. Johnson, supra; Feldslite Corporation of America, supra), that the failure to follow a regulatory requirement which was a requirement not found in the statute itself, did not automatically result in a conclusive presumption of abandonment.

In the instant case, however, having filed an initial proof of assessment work in calendar year 1977, the statute itself would require a subsequent filing of either proof of assessment work or a notice of intention to hold the claim on or before December 30, 1978. Since appellant failed to make such a filing, the statutory presumption of abandonment must apply.

[3] Appellant has also argued that its filing should have been considered as a premature filing for calendar year 1978. The Board has examined this contention in the past. See James V. Joyce, 42 IBLA 383 (1979), affirmed in James V. Joyce (On Reconsideration), 56 IBLA 327 (1981).

In James V. Joyce (On Reconsideration), supra, we discussed appellant's argument at length and rejected it as inconsistent with the intent of the statute. See discussion at 328-30. We specifically concluded that where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after January 1, and on or before December 30. Therefore, appellant's 1977 filing cannot satisfy the filing requirement for the year 1978. 5/

Appellant did not file evidence of assessment with BLM in 1978, and cannot circumvent this requirement by seeking to have its December

5/ Appellant, in its brief, contended that the Board's decision in Robert W. Perkin, 48 IBLA 209 (1980), was inconsistent with the rationale of the original Joyce decision. This is not correct. In Perkin, the appellant filed initial proof of assessment work on May 22, 1978. The State Office subsequently held the claim abandoned and void for failure to file assessment work for the 1979 assessment year on or before Oct. 22, 1979. The Board decision reversed this decision. While we note, in passing, that the emphasis which this decision placed on specific assessment years may have been misplaced (see Harry J. Pike, supra), the State Office decision was clearly in error in requiring a second filing prior to October 22, 1979. Having made the filing under 43 U.S.C. § 1744(a) (1976) in 1978, appellant was no longer affected by the Oct. 22, 1979, deadline, but rather was required to file future assessment proofs on or before Dec. 30, 1979, and each year thereafter. In Perkin, appellant had made his filing on Nov. 26, 1979. Thus, the Perkin decision is in no way contrary to the Board's Joyce holdings.

1977 filing of assessment work serve the dual purpose of a notice of intention to hold for 1978. This approach similarly fails because an annual filing of some kind was required by December 30, 1978, whether it was for assessment work or a notice of intention to hold. As we noted in Joyce (On Reconsideration), supra at n.4, an early filing of proof of assessment would not be prohibited; however, such filing will not relieve the claimant from making any filing at all during the subsequent calendar year. In the present case appellant must have filed with BLM in the calendar year 1978 either a separate notice of intent to hold or evidence of assessment work for the 1977-78 assessment year. Absent receipt of such filing the State office properly declared its claim abandoned and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

James L. Burski
Administrative Judge

APPENDIX A

NAME OF CLAIM	DATE OF LOCATION OR AMENDED LOCATION	DATE OF FILING WITH BLM	N MC NUMBER
Black Star No. 1	September 2, 1967	December 7, 1977	N MC-11431
Black Star No. 1	March 26, 1980	April 1, 1980	(Amendment)
Bluestone	September 5, 1967	December 7, 1977	N MC-11432
Bluestone	March 24, 1980	April 1, 1980	(Amendment)
Bluestone No. 1	September 6, 1967	December 7, 1977	N MC-11433
Bluestone No. 1	March 24, 1980	April 1, 1980	(Amendment)
Bluestone No. 2	September 6, 1967	December 7, 1977	N MC-11434
Bluestone No. 2	February 15, 1968	March 15, 1979	(Amendment)
Bluestone No. 2	March 23, 1980	April 1, 1980	(Amendment)
Pine Tree	September 7, 1967	December 7, 1977	N MC-11435
Pine Tree	March 24, 1980	April 1, 1980	(Amendment)
Pine Tree No. 1	September 7, 1967	December 7, 1977	N MC-11436
Pine Tree No. 1	March 24, 1980	April 1, 1980	(Amendment)
Long Climb No. 1	September 6, 1967	December 7, 1977	N MC-11437
Long Climb No. 1	March 23, 1980	April 1, 1980	(Amendment)
Long Climb No. 2	September 7, 1967	December 7, 1977	N MC!11438
Long Climb No. 2	March 21, 1980	April 1, 1980	(Amendment)
Long Climb No. 4	September 7, 1980	December 7, 1977	N MC!11439
Long Climb No. 4	March 23, 1980	April 1, 1980	(Amendment)
Hailstone No. 1	September 8, 1967	December 7, 1977	N MC-11440
Hailstone No. 1	March 25, 1980	April 1, 1980	(Amendment)
Blackstar	September 1, 1967	December 7, 1977	N MC-11441
Blackstar	March 22, 1980	April 1, 1980	(Amendment)

February 19, 1985

IBLA 81-251	:	N MC 11431 through N MC 11441
60 IBLA 90 (1981)	:	
	:	Mining Claims
N. L. BAROID PETROLEUM SERVICES	:	
(ON JUDICIAL REMAND)	:	Decision Vacated, Case Remanded

ORDER

On December 6, 1984, the Office of the Solicitor, on behalf of the Nevada State Office, Bureau of Land Management (BLM), submitted a report of remand pursuant to 43 CFR 4.29 in connection with the above-captioned appeal. The report recommended that the Board follow the order of the district court in NL Industries v. Watt, Case No. CIV-LV 82-176 RDF (D. Nev. March 14, 1984) which reversed and remanded the Board's decisions in N.L. Baroid Petroleum Services, 60 IBLA 90 (1981). In that case the Board affirmed a BLM decision which held the appellant's mining claims null and void because no annual proofs of labor were filed with BLM in 1978.

In light of the appeal of the district court decision filed by defendant intervenor All Minerals Corporation, and a pending motion before the district court to stay its order (that motion was denied by Minute Order dated December 24, 1984), we directed NL Industries, and All Minerals Corporation to file reports recommending procedures to follow in order to implement the district court's order.

On January 11, 1985, All Minerals filed a supplemental response to our order in which it attached a copy of a January 7, 1985, order of the Ninth Circuit Court of Appeals in Case No. 84-2344 which stayed the judgment of the district court until All Minerals' motion for Emergency Stay of Judgment "has been disposed of by the emergency motions panel of the Ninth Circuit Court of Appeals." On January 28, 1985, the Emergency Motions Panel of the Ninth Circuit issued an order denying All Minerals' motion. We have considered the recommendations of NL Industries, and All Minerals Corporation, along with those of the government, in light of that order. Under the circumstances, we are not persuaded to accept All Minerals' recommendations that the Board not implement the district court's order until its appeal has been heard by the Ninth Circuit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decision appealed from is vacated and the case is remanded to BLM with directions to reinstate NL Industries' mining claims consistent with the district court's order.

_____
Gail M. Frazier
Administrative Judge

We concur:

_____
Wm. Philip Horton
Chief Administrative Judge

_____
C. Randall Grant, Jr.
Administrative Judge

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